In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 375

HAROLD A. SWANSON, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Claims (Pet. App. 1A) is not reported.

JURISDICTION

The order of the Court of Claims dismissing the petition was entered on May 18, 1964. The petition for a writ of certiorari was filed on August 12, 1964. The jurisdiction of this court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner was entitled to the procedures provided by Section 14 of the Veterans' Preference Act prior to the termination of his temporary employment with the Agency for International Development.

STATUTE INVOLVED

Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 390, provides in pertinent part:

> * * * That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. * * *

STATEMENT

The Foreign Assistance Act of 1961, 75 Stat. 424, provided for the abolition of the International Cooperation Administration (ICA) and the transfer of its functions to a new agency. By Executive Order No. 10973, 26 Fed. Reg. 10469, the President ordered that the ICA be abolished and that the Agency for International Development (AID) assume its functions with such ICA personnel "as the Administrator

[of AID] shall deem necessary." Delegation of Authority No. 104, Section 1(c), 26 Fed. Reg. 10608.

Petitioner had been employed by the ICA as an Industry Advisor and was notified by letter of the AID Administrator that he would not be among those to be transferred to AID and that his employment would terminate with the abolition of ICA on November 3, 1961 (R. 37). The letter indicated, however, that petitioner would be given a temporary 30-day appointment in AID, together with such leave status as might be necessary, in order to permit the orderly processing of his termination (*ibid.*). Extensions of this temporary appointment were thereafter granted in order to enable petitioner to exercise re-employment rights elsewhere and to apply to a review board for reconsideration of the decision that he should not be permanently transferred to AID (R. 42-46, 56, 72-73). On January 5, 1962, petitioner was advised by the Administrator of AID that, on consideration of the review board's recommendation and other information submitted by him, it had been determined that his services were not needed by AID (R. 54). In order to enable petitioner to secure other federal employment and to establish his eligibility for retirement, the Administrator offered temporarily to continue petitioner on the rolls on leave or leave-without-pay status (*ibid.*). Petitioner thereupon requested to be continued on this status and, by two subsequent enlargements, the appointment was extended to December 15, 1962 (R. 72-73). In November 1962, petitioner obtained employment with the

Department of Commerce, and he was formally separated from AID on November 7, 1962 (R. 74-75).

In the interim petitioner also joined in a proceeding before the Appeals Examining Officer of the Civil Service Commission in which it was contended, on behalf of petitioner and others similarly situated, that the employees of ICA were entitled to permanent employment in AID under Section 12 of the Veterans' Preference Act (R. 47-53). The officer ruled that by virtue of Section 621(d) of the Foreign Assistance Act, Section 12 was inapplicable to employment by AID of former ICA employees (R. 57-58). This ruling was affirmed by the Board of Appeals and Review of the Civil Service Commission (R. 68-69).

Petitioner instituted the present back-pay action in the Court of Claims, contending that he had been improperly discharged by AID (R. 1-4). The petition was dismissed on cross-motions for summary judgment (R. 81).

ARGUMENT

The decision of the Court of Claims was correct, and there is no need for review by this Court. Petitioner's present contention appears to be that he was, in fact, a permanent employee of AID who was entitled to the procedural protection guaranteed by Section 14 of the Veterans' Preference Act. This claim is belied by the record, which makes it abundantly clear that petitioner's original appointment was temporary only, and that each subsequent extension was on a temporary time-limited

basis. Nor is there any merit to the claim, rejected by the Civil Service Commission, that Section 12 of the Veterans' Preference Act entitled petitioner to employment by AID. The Foreign Assistance Act expressly provided in Section 621(d), 75 Stat. 445-446 as follows:

> (d) On the date of the abolition of the International Cooperation Administration the President shall transfer to an officer or head of an agency of the United States Government carrying out functions under part I such offices, entities, functions, property, records, and funds of such agency, not otherwise disposed of by this Act, as may be necessary, and *notwithstanding any other provision of law, shall transfer to such officer or head of agency such personnel of the International Cooperation Administration as the President determines to be necessary.* [Emphasis added.]

The legislative history demonstrates that in authorizing the President to transfer only such ICA employees as were deemed necessary "notwithstanding any other provision of law," Congress intended to free such transfers from any claims otherwise available under statutes protecting the rights of federal employees. See H. Rep. (Conf.) No. 1088, 87th Cong., 1st Sess., p. 63.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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